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BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of:)	
)	
Implementation of the Cable Television)	
Consumer Protection and Competition)	MM Docket No. 92-259
Act of 1992)	
)	
Broadcast Signal Carriage Issues)	
)	
Reexamination of the Effective)	
Competition Standard for the)	MM Docket No. 90-4
Regulation of Cable Television)	
Basic Service Rates)	
)	
Request by TV 14, Inc. to Amend)	
Section 76.51 of the Commission's)	MM Docket No. 92-295
Rules to Include Rome, Georgia in the)	RM-8016
Atlanta, Georgia Television Market)	

To: The Commission

PETITION FOR RECONSIDERATION

Star Cable Associates ("Star Cable"), by its attorneys, and pursuant to Section 1.106(b)(1) of the Commission's rules, hereby requests reconsideration of the Commission's above-referenced Report and Order.¹ Star Cable participated actively in this

¹Report and Order in MM Docket No. 92-259, FCC 93-144, 58 FR 17350 (1993) ("Order").

docket, having been a party to Comments² filed in response to the Commission's Notice of Proposed Rulemaking.³ Accordingly, Star Cable is a party to this proceeding with standing to file this Petition pursuant to Section 1.106(b)(1) of the Commission's rules.

DISCUSSION

As part of its Order, the Commission granted three requests to expand and rename its list of major television markets found in Section 76.51 of the Commission's rules.⁴ In so doing, the Commission stated that it would "update the existing list by adding those designated communities requested by parties providing specific evidence that change to a particular market is warranted."⁵ Star Cable has had such a request pending before the Commission since January 1991.⁶ Moreover, Star Cable's Comments in this docket specifically referenced such Petition and

²Comments filed on Jan. 4, 1993 by Adelphia Communications Corporation et al. in MM Docket No. 92-259 ("Comments").

³Notice of Proposed Rulemaking in MM Docket No. 92-259, 7 FCC Rcd 8055 (1992).

⁴Order at ¶ 50. The Commission (1) renamed the Columbus, OH market to include Chillicothe; (2) added New London to the Hartford-New Haven-New Britain-Waterbury, CT market; and (3) expanded and renamed the Atlanta, GA market to include Atlanta-Rome, GA.

⁵Id.

⁶Petition for Rulemaking filed Jan. 8, 1991 by Star Cable Associates, ("Petition") (copy attached).

requested that the Commission act on it,⁷ yet the Commission did not consider Star Cable's request in its Order.

Star Cable's Petition requested that the Commission amend Section 76.51(a) of its rules to add Alvin, TX to the existing Houston, TX major market designation. According to the Petition, the following evidence (briefly summarized here) warranted the amendment to the Houston market:

1. The Alvin, TX market is created by a single UHF television station, KSHS. KSHS's Grade B contour, however, is largely coterminous with those of the six commercial Houston television stations. In fact, KSHS shares a common transmitter site with two of those stations.⁸
2. Alvin is well within the Grade B contours of the six Houston commercial television stations.⁹
3. KSHS's Grade A contour covers and extends well beyond Houston. In fact, all land covered by the KSHS predicted Grade B contour falls within the Houston ADI.¹⁰
4. The Arbitron Company lists KSHS as a station within the Houston ADI, and includes Brazoria County, in which

⁷Comments at 7.

⁸Petition at 3.

⁹Id. at 4, Att. 1.

¹⁰Id.

Alvin is located, as a Houston ADI county.¹¹

5. KSHS is a specialty format station, an affiliate of the Home Shopping Network. Accordingly, KSHS's ratings are very low --it is not even significantly viewed in its home county. It is thus inappropriate to consider Alvin a separate, smaller commercial market based solely on the presence of KSHS.¹²
6. Stations within the Houston-Alvin market rely on both cities for economic support, especially KSHS, by virtue of its home shopping format.¹³
7. Alvin is less than 25 miles from downtown Houston.¹⁴
8. Exclusion of Alvin from the Houston market designation has the effect of imposing unequal copyright liabilities on cable systems located in different parts of what is actually the same market.¹⁵

As Star Cable's Petition demonstrated, these factors clearly warranted change to the Houston market.¹⁶ At minimum, the Petition clearly met the standard for consideration in the Order, i.e., that parties provide "specific evidence that change to a

¹¹Id. at 5.

¹²Id. at 5-6.

¹³Id. at 6-7.

¹⁴Id. at 8.

¹⁵Id. at 9-10.

¹⁶See Petition; Major Television Markets (Fresno-Visalia, CA), 57 RR 2d 1122 (1985); Major Television Markets (Orlando-Daytona Beach-Melbourne-Cocoa, FL), 57 RR 2d 685 (1985).

particular market is warranted."¹⁷ In addition to providing such evidence in its Petition, Star Cable specifically requested in its Comments that its Petition be incorporated by reference into this proceeding, so that the Commission could address the issue of amending Section 76.51(a) of its rules to add Alvin, TX to the Houston, TX market.¹⁸ It is respectfully submitted that the Commission's failure to address this issue, even if inadvertent, was erroneous and should be reconsidered.

CONCLUSION

For the reasons set forth above, Star Cable requests that the Commission reconsider its Order in this proceeding to add Alvin, TX to the Houston, TX major market designation. Alternatively, Star Cable requests that the Commission act upon Star Cable's Petition, which has been pending for over two years, by amending Section 76.51 to add Alvin, TX as a designated community to the Houston television market.¹⁹

¹⁷Order at ¶ 50.

¹⁸Comments at 7.

¹⁹If the Commission chooses this second option, Star Cable requests that the Commission consider this matter under the expedited rulemaking procedure provided for in the Order, whereby the Commission "will issue a notice of proposed rulemaking based on the submitted petition without first seeking public comment on whether we should do so." Order at ¶ 50.

- 6 -

Respectfully submitted

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Federal Communications Commission
Office of the Secretary

WASHINGTON, D.C. 20554

To: The Commission

January 8, 1991

TABLE OF CONTENTS

	<u>Page</u>
Summary.....	i
I. Houston and Alvin, Texas Comprise A Single Television Market.....	2
II. The Public Interest Favors The Addition Of Alvin To The Houston Market.....	7
III. Conclusions.....	11

SUMMARY

Star Cable Associates ("Star") herein petitions the Commission for a rulemaking to amend Section 76.51(a) of the FCC Rules to add the community of Alvin, Texas to the Houston, Texas major market designation. Alvin is the community of license of independent UHF television station KSHH. Star owns and operates a cable television system serving the community of Brazoria and portions of Brazoria County, Texas, within the Alvin 35-mile zone.

Alvin and Houston comprise a single television market. The Grade B contours of KSHH are largely coterminous with those of the six commercial television stations licensed to Houston, and KSHH actually shares a common transmitter site with two of those stations. Alvin is well within the Grade A contours of all six Houston commercial stations. Moreover, the KSHH Grade A contour covers and extends well beyond Houston. KSHH's predicted Grade B contour covers four of the counties which comprise the Houston ADI in their entirety, including Harris County, in which Houston is located. Those four counties alone contain 81% of the television households in the Houston ADI.

The Arbitron Company lists KSHH as a station within the Houston ADI, and includes Brazoria County, in which Alvin is located, as a Houston ADI county. In fact, Brazoria is the fourth largest county in the Houston ADI in terms of TV households. Five Houston television stations are significantly viewed in Alvin's home county. Thus, there can be no doubt

that Alvin and Houston constitute a single major television market, and that the stations within that market rely on both cities for viewership and economic support. Indeed, the licensee of KHSB calls itself HSN Broadcasting of Houston, Inc.

Furthermore, the factors established in prior FCC decisions amending Section 76.51 favor the addition of Alvin to

outside of the Houston 35-mile zone cannot carry any distant independent stations without incurring the 3.75% copyright penalty. Given that Alvin and Houston actually comprise one television market, there is no justification for allowing only some market stations to import additional desirable signals without facing the 3.75% distant signal copyright penalty. Third, amendment of Section 76.51 of the Rules would benefit cable subscribers by enabling cable systems throughout the market to carry the same number of distant independent signals without financial penalty.

Thus, it is respectfully requested that the Commission initiate a rulemaking to amend Section 76.51 of its Rules to add the community of Alvin, Texas to the existing Houston, Texas market designation. Alternatively, the Commission might accomplish the same result without formally amending the Rules by issuing a declaratory ruling that Alvin should be considered part of the Houston market pending a more comprehensive update of Section 76.51.

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1/ In another proceeding, the Commission has recognized that there may be a need to update the Section 76.51 list of television markets in its entirety. See Further Notice of Proposed Rulemaking in Gen. Docket No. 87-24, 3 FCC Rcd 6171 (1988) at ¶35.

Brazoria and portions of Brazoria County, Texas, within the Alvin 35 mile zone. As will be demonstrated below, Houston and Alvin constitute a single television market and the addition of Alvin to the Houston market designation will satisfy the public interest factors previously identified by the Commission for similar requests.

I. Houston and Alvin, Texas Comprise A Single Television Market

In Major Television Markets (Fresno-Visalia, CA)

("Fresno-Visalia"), 57 RR 2d 1122, 1124 (1985), the Commission concluded that the communities of Visalia and Fresno, California comprised a single market based on a number of circumstances which are also present here. The four commercial television stations licensed to Fresno covered Visalia with their predicted Grade B contours. Additionally, the Visalia station covered Fresno with a city grade signal and its Grade A contour extended beyond the Fresno city limits. The Arbitron and Nielsen ratings services included the Visalia station with those licensed to Fresno in their ratings reports for the Fresno market; that station also gained significant ratings in the Fresno market. Thus, it appeared that the Visalia and Fresno stations competed in the same market, and that market stations relied upon both Visalia and Fresno for advertising revenues. The FCC undertook a similar analysis in Major Television Markets (Orlando-Daytona Beach-Melbourne-Cocoa, FL) ("Orlando-Daytona Beach"), 57 RR 2d 685, 690-92 (1985) (adding Melbourne to the existing Orlando-Daytona Beach market

designation). The relevant circumstances identified in these cases compel the conclusion that Alvin and Houston also constitute one market.

There are six commercial television stations licensed to Houston, Texas.^{2/} Attachment 1 hereto, prepared for Star by the engineering firm Moffet, Larson & Johnson, Inc., is a map of the Houston area showing the predicted Grade B contours of each of these stations and KSHS. As demonstrated by Attachment 1, the Grade B contours of KSHS are largely coterminous with those of the six commercial Houston stations. Indeed, KSHS shares a common transmitter site with two of these stations, KPRC-TV and KHTV, pursuant to a 10 year lease.^{3/} Compare Fresno-Visalia, 57 RR 2d at 1125 (adding Hanford, California to the Fresno market designation, noting that the station licensed to Hanford shared a common transmitter site with three Fresno stations); Press Television Corp., 67 RR 2d 240 (1989) (waiving

obtaining non-network programming exclusivity rights, noting that the station licensed to Clermont shares a common transmitter site with a Daytona Beach station).

Alvin is well within the Grade B contours of the six Houston commercial television stations. See Attachment 1. Indeed, the contour maps for these stations published in the current Television and Cable Factbook indicate that Alvin is well within their Grade A contours. Warren Publishing, Inc., Television And Cable Factbook, Stations Vol. No. 58 (1990) at A-1085 - A-1091.

Similarly, KSHS's Grade A contour covers and extends well beyond Houston. Attachment 1. KSHS's predicted city grade contour also covers Houston. See application for modification of construction permit, File No. BMPCT-841221LB, Exhibit E at Figure 7. In fact, all of the land area covered by the KSHS predicted Grade B contour falls within the Houston ADI. See Broadcasting Publications Inc., Broadcasting Yearbook (1990) at C-159 (setting out the Houston, ADI counties); Television and Cable Factbook at A-1043 (setting out the KSHS contours on those counties). KSHS's predicted Grade B contour covers four of the counties which comprise the Houston ADI in their entirety: Harris (in which Houston is located), Fort Bend, Waller and Galveston. These four counties alone contain 81% of the television households (1,189,400 of 1,453,200) in the Houston ADI. The KSHS predicted Grade B contour also covers significant portions of Austin, Wharton, Matagorda, Brazoria, Chambers, Liberty and Montgomery Counties within the Houston

ADI. Id; Attachment 1 hereto.

By comparison, in Orlando-Daytona Beach, the Commission added Melbourne to the Orlando-Daytona Beach designated market despite the fact that the petitioning Melbourne station's Grade B contour did not extend to Daytona Beach, so that the station did not serve or rely economically on that part of the market. The Commission emphasized that in adopting signal carriage rules in 1972, it recognized that portions of hyphenated markets would occasionally be located beyond the Grade B contours of some market stations. 57 RR 2d at 691, citing Cable Television Report and Order, 36 FCC 2d 143, 176 (1972) (subsequent history omitted).

It is not surprising that the Arbitron Company lists KHSB as a station within the Houston ADI, and includes Brazoria County, in which Alvin is located, as a Houston ADI county. See Broadcasting Yearbook at C-159; Television and Cable Factbook at A-1; 1990-91 Arbitron Company county viewing data for Brazoria County, Texas. In fact, as of 1990, Brazoria was the 4th largest county in the Houston ADI in terms of TV households, with 65,200 of 1,453,200, or 4.5%, of all Houston ADI TV households. Broadcasting Yearbook at C-159. Five Houston television stations, KPRC-TV, KHOU-TV, KTRK-TV, KHTV and KTXH, are significantly viewed in Alvin's home county of Brazoria. See Warren Publishing, Inc., Cable and Station Coverage Atlas (1990) at 92; Public Notice, Report No. 3282, released June 6, 1990.

Unlike the Visalia station in Fresno-Visalia, however,

KHSH is not significantly viewed in Houston's own county or in any Houston ADI county. This factor is not relevant in the present case because KHSH is a specialty format station. As an affiliate of the Home Shopping Network ("HSN"), the station cannot be expected to garner the ratings of a typical independent station of mass appeal in any county. Indeed, KHSH is not even significantly viewed in its home county.^{4/} The Commission recognized the "unique nature" of the programming on HSN affiliates in 1989, when it granted HSN waivers of the dual network and prime time access rules. It concluded that "HSN is not involved in the production or acquisition of traditional entertainment programming; it offers only specialized programming." Home Shopping Network, Inc., 66 RR 2d 175, 179 (1989).^{5/} This fact alone highlights the inappropriateness of considering Alvin, Texas to be a separate, smaller commercial television market based solely on the presence of a specialty format, home shopping station.

Based on the foregoing, there can be no doubt that Alvin and Houston constitute a single major television market, and that stations within that market rely on both cities for

^{4/} See Cable and Station Coverage Atlas at 92. According to the 1990-91 Arbitron ratings for non-cable television households in the Houston ADI, KHSH(TV) receives a 1% total share and 2% afternoon day share for Fort Bend County. In contrast, KHSH does not receive a measurable share of the audience in its home county, Brazoria.

^{5/} In another case, the Commission stated its view that the HSN format was "an example of licensee experimentation." Family Media, Inc., 63 RR 2d 284, 289 (1987).

viewership and economic support.^{6/} This reality has apparently not been lost on the licensee of KSHS, which calls itself "HSN Broadcasting of Houston, Inc." (formerly "Silver King Broadcasting of Houston, Inc.").^{7/}

II. The Public Interest Favors The Addition Of Alvin To The Houston Market

In Fresno-Visalia, the FCC outlined four factors established in prior decisions which are applicable to a request to add a community to an existing market designation. They are: (1) the distance between the proposed community and existing designated community; (2) whether a station would be afforded expanded cable carriage rights beyond its Grade B contour; (3) the presence of a clear showing of particularized need in the request for a change of designation; and (4) an indication of benefit to the public from the proposed change.

^{6/} While the Houston stations rely on both Houston and Alvin for advertising support, KSHS, by virtue of its format, undoubtedly relies on both cities for the sale of merchandise to viewers - another form of economic support.

^{7/} See KSHS annual ownership report filed July 28, 1989. Moreover, when the permittee of KSHS (formerly KTHT) filed its license application, its communications counsel's transmittal letter referenced the community of license as "Alvin (Houston), Texas." See BLCT-860206KF (emphasis added). In an earlier request for the extension of its construction permit, the permittee represented to the Commission that it had entered several agreements "with the sole purpose of bringing a new station to the public of the Houston metropolitan area." Further, the permittee had "made vast progress in establishing station KTHT as the first minority controlled full power commercial television station in the Houston, Texas market." See BMPLT-851118KG, Exhibit 1 at 6, 9-10 (emphasis added).

55 RR 2d at 1124, citing Television Muscle Shoals, 48 RR 2d 1191 (1980), recon. denied, 87 FCC 2d 507 (1981); Orlando-Daytona Beach, 57 RR 2d at 692. To the extent they are applicable, these factors support the amendment to Section 76.51 requested herein.

First, Alvin is less than 25 miles from downtown Houston. See Rand McNally Road Atlas (1990) at 95. In contrast, in Fresno-Visalia, Visalia was slightly more than 35 miles from Fresno, the designated community. Another community added, Hanford, was approximately 30 miles from Fresno. 57 RR 2d at 1124-25. Melbourne, the community added in Orlando-Daytona Beach, supra, was at least 50 miles from Orlando and more than 75 miles from Daytona Beach. See Rand McNally Road Atlas at 21. In Television Muscle Shoals, the Commission denied a request to add Florence, Alabama to the Huntsville-Decatur hyphenated market designation in part because Florence and Huntsville were some 75 miles apart. 48 RR 2d at 1194. Compare Press Television Corp., supra (Section 73.658 of the rules waived to consider station licensed to Clermont, Florida, 25 miles west of Orlando, part of Orlando-Daytona Beach designated market for purposes of obtaining non-network programming exclusivity rights).

To the extent that the second factor identified in Fresno-Visalia is still relevant in the absence of mandatory cable carriage rules, the addition of Alvin to the Houston designated major market would not require carriage of KHSB(TV) (or any other station) beyond its Grade B contour.

The third and fourth factors require showings of particularized need and public benefit. The exclusion of Alvin from the Houston market designation under Section 76.51 of the FCC rules has the effect, under federal copyright law, 17 U.S.C. Sec. 101 et seq., of imposing unequal copyright liabilities on cable systems located in different parts of what is actually the same market. Generally speaking, the cable television "compulsory license" imposes no copyright liability for the carriage of specific "local" television signals.^{8/} 17 U.S.C. Secs. 111(c) & (d). For purposes of royalty calculations, the Copyright Act defines local signals as those which were subject to mandatory carriage pursuant to the FCC

Docket No. 20496, 41 RR 2d 121 (1977).

Cable operators in the Top 50 markets are generally entitled to import the signals of two distant independent stations without triggering the 3.75% distant signal penalty. As a result, cable systems within the Houston designated market may carry all Houston independent stations, two distant independents, as well as the Alvin independent (which appears to cover the entire Houston 35 mile zone with its predicted Grade B contour) without incurring the 3.75% distant signal penalty. In contrast, cable operators in "smaller" markets (those outside of the Top 100) generally can import no more than one distant independent station's signal without incurring distant signal liability. Because Alvin is the community of license of an independent television station, however, systems within the 35 mile zone of the Alvin smaller market and outside of the Houston 35 mile zone cannot carry any distant independent stations without incurring the 3.75% distant signal penalty. Given that Alvin and Houston actually comprise one television market from a practical and economic standpoint, there is no justification for allowing only some cable operators in the market to import desirable broadcast signals without facing onerous distant signal liability.

Amendment of Section 76.51 of the rules not only would correct the inequitable treatment of certain cable operators within the Houston-Alvin market under federal copyright law, but also would benefit the public substantially. Cable subscribers in the affected areas would benefit from the likely

increase in carriage of desirable distant independent signals. Compare Orlando-Daytona Beach, 57 RR 2d at 692 (public benefit found in provision of independent station's non-duplicative programming to new audiences due to increased carriage rights).

The Commission has previously recognized the relevance of copyright issues with respect to amendments to Section 76.51. In Orlando-Daytona Beach, the Commission stated that it "appreciate[d] the copyright concerns" raised by cable operators filing comments in the proceeding, who feared that the Copyright Royalty Tribunal would not recognize as "local" those stations licensed to the communities added to the designated market. 57 RR 2d at 693-94. In the present case, copyright concerns are especially relevant because they demonstrate both the particularized need and public benefit of the amendment to Section 76.51 proposed herein.

III. Conclusions

Houston and Alvin constitute a single television market, in which stations rely on both cities for viewership and economic support. Moreover, addition of Alvin to the Houston designated market would fully satisfy the factors previously identified by the Commission for considering such requests. Accordingly, Star respectfully requests that the Commission initiate a rulemaking to amend Section 76.51 of its rules to add the community of Alvin, Texas to the existing Houston,

Texas market designation.^{9/}

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^{9/} The Commission might accomplish the same result without formally amending Section 76.51 by issuing a declaratory ruling that Alvin should be considered part of the Houston market, at least pending its decision on whether to update Section 76.51 in Gen. Docket No. 87-24. Compare Press Television Corp., 67 RR 2d 240 (1989) (waiving Section 73.658 of the rules to consider a television station part of a designated market for purposes of obtaining non-network programming exclusivity rights, although noting that the possible revision of Section 73.658 is pending in General Docket No. 87-24).

Attachment 1

KHSH(TV) Grade A and B Contours
Houston TVs Grade B Contours

MAP NOT
INCLUDED
WITH THIS
COPY